BRIEF IN SUPPORT OF PETITION FOR WRITS FOR CERTIORARI.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Fourth Circuit, here sought to be reviewed, will be reported as *Parker v. MacBryde,* 132 Fed. 2nd — (R., p. 37). The District Court's opinion is reported as *MacBryde v. Burnett,* 45 Fed. Supp. 451 (R., p. 8).

This same case has been reported in other proceedings to determine the amount of the corpus, not here involved, reported as *MacBryde v. Burnett,* 44 Fed. Supp. 833, affirmed on appeal by the Circuit Court of Appeals for the Fourth Circuit, as *MacBryde v. Burnett,* 132 Fed. 2nd —, decided December 30, 1942.

JURISDICTION.

The ground upon which review is here sought by way of certiorari is fully stated in the petition (supra, p. 2). Jurisdiction was obtained in the District Court by diversity of citizenship, with the requisite amount in controversy. Some of the defendants moved to dismiss, for lack of jurisdiction, because of omitted parties. The motions were fully argued and were overruled. The opinion rendered by the District Court on this point is reported as *MacBryde v. Burnett,* 41 Fed. Supp. 661. There was no appeal on this point.

STATEMENT OF FACTS.

The facts are not in dispute. The fund here involved was originally created by the will of Mary Donaldson probated in the Orphans' Court of Baltimore City in 1920. By

the second paragraph of the will the testatrix bequeathed to her niece, Sara J. Parker, the

> "sum of $10,000 for and during her natural life and after her death I bequeath the said $10,000 to her brothers and sister of the whole blood in such proportions as she may designate by her last will and testament, but should she die intestate the said sum of money shall be divided among them equally." (R., p. 1).

The estate, when distributed, was not sufficient to pay all bequests in full. This trust fund was distributed as approximately $7,800. The corpus was never in fact paid to the life tenant, Sara J. Parker. Mary Donaldson's administrator invested it, held the corpus and paid the income to the life tenant. When she died, it had increased to approximately $37,000, which is the fund here at issue. This corpus was determined and realized by the other proceedings referred to above.

In 1920, there were three brothers of the whole blood—Henry, Robert and LeRoy, and one sister of the whole blood, Mary D. Winder (R., p. 4).

Henry died in 1925. He was childless. His widow survived him, but she died within a few months. John W. Davidge, the widow's executor and assignee, claims a one-fourth share for Henry. The facts as to the devolution of Henry's estate as well as his widow's will are in the Record, p. 4 and p. 50.

The life tenant, Sara J. Parker, in 1927 made a will which provided—

> "The fund of $10,000 under the will of my aunt, Mary Donaldson (which said will is now of record among the records of the Orphans' Court of Baltimore City), which I was to enjoy for life with the right of disposition to my brothers, and sister at my death, I

give and bequeath in equal parts to my brothers, LeRoy Parker and Robert B. Parker, and my sister, Mary D. Winder." (R., p. 2).

Robert Parker died August 2, 1940. He left a widow and a son. His widow as executrix and residuary legatee claims a share of this fund. Robert's will is in the Record, p. 7.

Sara J. Parker, the life tenant, died November 12, 1940. One brother, LeRoy (who has since died) and one sister survived her.

Judge Chesnut in the District Court held that the two survivors took the entire estate, as they were the only eligible appointees. The Circuit Court of Appeals in an opinion by Judge Soper, reversed this determination, and awarded the fund in four equal parts, one to each of the surviving brother and the surviving sister, and one to each of the personal representatives of the two pre-deceased brothers.

SPECIFICATION OF ERRORS.

Petitioners specify only one error—that the Circuit Court of Appeals held the entire exercise of the power of appointment invalid. Petitioners urge that the power was validly exercised under Maryland Law in favor of the only eligible appointees. They claim that these two appointees take the entire estate.

ARGUMENT.

The contentions of the petitioners are summarized thus:

I. The death of two appointees otherwise eligible for a share of the Donaldson Estate prior to Sara Parker, made them (and their representatives) ineligible to take.

II. The invalidity in the exercise of the power due to the inclusion of one ineligible appointee, and the exclusion of another ineligible appointee (if this could possibly be an invalidity) was only partial. The remaining appointments to the two eligible subjects were valid and enforceable.

III. The power was exercised; and under the will of Sara Parker, the estate went "in equal parts" entirely to the only eligible appointees.

I.

Effect of Death of Subjects before Donee of the Power.

Two brothers of the life tenant (the donee of the power) predeceased her. It is undoubtedly the universal law that this made them ineligible subjects for appointment. The District Court quoted the relevant authorities (R., pp. 11-13). The Circuit Court of Appeals referred to this proposition as "not questioned by the appellants" (respondents here) (R., p. 39). Maryland has extended this doctrine by deciding that upon the death of such appointees, the donee cannot name children of the deceased subjects in their place.

Smith v. Hardesty, 88 Md. 387.

It may be a matter of interest here to point to the origin of this rule probably in the Common Law principle of lapsing of rights upon the death of the person concerned. A very close parallel was the original Maryland view (changed by statute in 1810—Maryland Code of Public General Laws—1939, Article 93, sec. 340) that all devises and legacies lapsed upon the death of the devisee or legatee before the testator.

Livingston v. Safe Deposit Co., 157 Md. 492-501.
Helms v. Franciscus, 2 Bland (Maryland) 544-560.

Admittedly, no statute has been passed in Maryland which operates to prevent the lapsing of the appointment here to Robert by reason of his death before Sara Parker (R., p. 12).

II.

Maryland law as to partial invalidity of the Exercise of Special Powers of Appointment by Will.

We shall first discuss this point as to the inclusion of Robert, which we believe also disposes of the idea that the power was invalidly exercised when the donee (Sara Parker) omitted from her appointment her brother, Henry, whom she could not lawfully include.

A.

Petitioners contend that Sara Parker validly exercised the power as to the *three* subjects surviving when she drew her will. They further contend that the Maryland decision by its court of last resort in *Graham v. Whitridge*, 99 Md. 248, makes it mandatory, to hold here that the partial invalidity by reason of the *lapsing* of the appointment to *Robert* due to his death, did not void the entire exercise of the power, and that the appointments to the survivors, LeRoy and Mary Winder, are valid and effective. The District Court so held. We have quoted his language in the petition above.

In *Graham v. Whitridge*, the original testator, George Brown, bequeathed a fund in trust for his daughter, Grace Ann, for life. He gave her a power of appointment by will, operative if she died without issue. This contingency occurred. Under this provision, she had the power of appointment by will:

> "* * * to, and for such of my other children, or their descendants or descendant, and in such proportions, and for such estate or estates therein * * * as

> my said daughter, Grace Ann, may by her last will and testament * * * name limit and appoint to take the same". (99 Md. 270).

Acting under this power, Grace Ann left a will making a number of provisions for appointment of the fund in question to certain children and descendants of the testator, George Brown. Two of these provisions were held invalid as in violation of the rule against perpetuities (99 Md. 276). Chief Judge McSherry (one of Maryland's ablest Judges) wrote the opinion holding that the well appointed portions were valid and enforceable. In so determining, the Maryland Court merely followed the general rule adopted in England and well stated in the eminent authority, *Sugden on Powers* (99 Md. 280).

There is nothing peculiar about this Maryland rule. It is the one universally applied.

> 121 *A. L. R.* 1241.
> 49 *Corpus Juris,* p. 1301, sec. 136, note 13(a).
> 41 *American Jurisprudence,* p. 861, sec. 77.
> *Farwell on Powers,* p. 358.

The rule here contended for as controlling under the Maryland law is not a detached principle, applicable solely to testamentary law. It is the law of Maryland, and of all other jurisdictions, that when a statute contains both valid and invalid provisions, the valid portions will stand and be effective (even when contained in the same section) unless they are essentially and inseparably connected in substance.

> *Hall v. State,* 121 Md. 577-582.
> *Leser v. Lowenstein,* 129 Md. 244-264.
> 59 *Corpus Juris,* p. 639, sec. 205.

The same principle applies even to contracts.

> *Nicholson v. Ellis,* 110 Md. 322-333.
> 13 *Corpus Juris,* p. 515, sec. 472.

B.

The Circuit Court of Appeals refused to follow *Graham v. Whitridge,* supra, but elected instead to apply to this case the decisions in two other Maryland cases, which we respectfully urge are not in point here.

Myers v. Safe Deposit & Trust Company, 73 Md. 413.
Reed v. McIlvain, 113 Md. 40.

Judge Chesnut's opinion points out the inapplicability of these two cases:

> "The general rule is also recognized in Myers v. Safe Deposit & Trust Co., 73 Md. 413, and in Reed v. McIlvain, 113 Md. 140, in both of which cases, however, the exercise of the power was held wholly invalid because the donee, by blending her individual estate with that over which she had the power of appointment, and departing substantially from the limitations imposed by the donor in making the appointment, created such a confusing and unequal distribution that it was regarded as entirely inconsistent with the donor's general testamentary scheme." (R., p. 20).

Other basic facts distinguish these two cases. In *Myers v. Safe Deposit & Trust Co.,* the donee attempted to create trust estates in the appointed property which the power did not authorize. (73 Md. 420/421.) See a very clear distinction between *Myers v. Safe Deposit & Trust Co.* and *Graham v. Whitridge,* supra, in a case note in 121 *A. L. R.* 1241.

In discussing these two Maryland cases upon which the Circuit Court of Appeals relied, in preference to *Graham v. Whitridge,* the opinion of that court concluded with the following statement before the final paragraph (R., p. 46):

> "* * * and it is clear from a careful examination of the two cases in which total invalidity was declared

> that the result *depended not on the blending of assets but upon the determination of the court to effectuate* as far as possible the intention of the testatrix". (Italics are ours.)

This statement is directly in conflict with the final paragraphs in *Reed v. McIlvain*, the latest of the three cases, commenting on and quoting from *Graham v. Whitridge* (from 113 Md., page 150):

> "* * * 'In each and every instance, so far as we have been able to discover, there was either a blending of the individual property of the testator with that over which he had the power of appointment, or else as in the *McElfresh v. Schley* case (2 Gill 101), it was only the individual property of the testator which was disposed of.'
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> "It is thus obvious that if Mrs. Greenway (she was the donee in Graham v. Whitridge) had blended her estate with her father's, the Court would have held that that case would have been governed by the decision in *Myers v. Safe Deposit and Trust Co.*, supra, and as Mrs. McIlvain did blend her estate with her father's, the decree of Judge Heuisler which nullified the entire attempted appointment of the settled estate without disturbing the disposition of Mrs. McIlvain's individual estate should be affirmed."

Briefly, in *Graham v. Whitridge* (and in the case at bar) some of the *persons* appointed were ineligible; such a condition does not invalidate the exercise of the power as to the other appointees. But in the two cases followed by the Circuit Court of Appeals, the donees handled the *property* appointed by them in such a way that the intentions of the original testators were completely frustrated.

C.

The Circuit Court of Appeals stated an alternative reason why the District Court's disposition of the estate was improper. It held that the power was a non-exclusive one (Sara could not omit any one of the four possible subjects). Petitioners do not acquiesce in this conclusion, but find it unnecessary to dispute it. The Circuit Court of Appeals further held that the entire exercise of the power was invalid because Sara Parker, the donee, excluded the deceased brother, Henry, from any benefit thereunder,—(R., pp. 40/41) but the opinion of that Court conceded that Henry was ineligible by reason of death (R., p. 39).

The Circuit Court of Appeals then decided that the Maryland law required it to declare the entire exercise of the power invalid merely because the donee of the power did not name as one of the appointees, a person who was totally ineligible, and who if included, must be excluded. The mere statement of this idea shows its unsoundness. No other court anywhere has ever reached such a conclusion.

This result is basically opposed to *Graham v. Whitridge*. If one could conclude that it is a technical violation to fail to include in the exercise of the power a subject who cannot be given a share, such an omission could not create an illegality in the exercise of the power in favor of other eligible appointees. *Graham v. Whitridge* sustains them.

But more extraordinarily still, the very authority cited by the Circuit Court of Appeals also refutes the fundamental proposition upon which that Court rests its conclusion on this point.

Not only does the quotation from section 361 of *A. L. I.—Restatement on Property—Future Interests,* in the opinion (R., p. 41) introduce the qualifying phrase *"then living"*, but also a few pages later in the text, this is stated:

A. L. I.—Restatement—Property—Future Interests, page 1992, Illustration under Section 361:

> "*c—Death of an object before the exercise of the power.*
>
> "When a power is non-exclusive, the death of an object permits a later appointment to the surviving members of the group. The appointment is not rendered ineffective by the fact that the estate of the deceased object is thereby prevented from receiving any part of the property in default of appointment. The estate is not an object of the power.
>
> *Illustration.*
>
> "5. A by will transfers $10,000 in trust for B for life and then in trust 'for all and every the children of B in such shares as B shall by will appoint and in default of appointment for the children equally.' Three children are born to B. One dies in B's life time. B by will otherwise effectively appoints to the other two. This is an effective appointment."

D.

With the conclusion that the exercise of the power was completely frustrated for these two reasons (whether regarded as alternative or cumulative, R., p. 46) the Circuit Court of Appeals proceeded to distribute the estate as if Sara Parker were *intestate* (R., p. 41). Admittedly, she was *not intestate*. She left a complete will. She exercised the power as far as it was possible to do so. The fact that two appointees were ineligible is immaterial. The authorities permit the exercise of the power even when there is only one eligible appointee.

41 *American Jurisprudence*, p. 853, note 9.

III.

The District Court's Disposition of the Entire Estate.

In following *Graham v. Whitridge*, Judge Chesnut held that the Maryland Law as well as the general law outside of that State (R., p. 20) compelled the finding that Sara Parker's appointment of shares equally to LeRoy Parker and Mary Winder disposed of two-thirds of the corpus. No Maryland case was available to control the disposition of the remaining third, but the District Court concluded that the English decisions (usually followed in Maryland) made it obligatory law to award the entire estate "in equal parts" (language of Donaldson will) to the two surviving appointees (R., pp. 25/27).

This is the only logical conclusion in a situation where, *first*, the power has been validly exercised, and, *second*, where the only persons eligible take the estate.

As the Circuit Court of Appeals found the entire exercise of the power invalid, it did not pass upon the issue of what to do with the third share attempted to be appointed to the pre-deceased Robert. We presume, however, if this Honorable Court finds that the Maryland law compels sustaining the partial exercise of the power, it will reinstate Judge Chesnut's disposition of the entire estate.

In this situation, we shall not discuss any other disposition of this matter until the briefs of respondents or some other development, makes further comment desirable.

It is obvious that Judge Chesnut was referring to the dispute about the disposition of this third share when he said in his opinion (R., top p. 19): "This is a question which is not free from difficulty of solution under the Maryland decision * * *". He could not have intended it to apply to the question of the Maryland Law as to partial invalidity in the exercise of special powers of appointment. His comments (R., p. 20) negative any such thought.

CONCLUSION.

The District Court interpreted the Maryland Law as he found it (R., p. 25), but he believed the disposition of the fund equally between the appointees living at the time that the exercise of the power became effective, by the death of the donee, is in line with what the donor and the donee intended (R., p. 26).

The Circuit Court of Appeals had a different idea (R., p. 43), though it had some difficulty harmonizing its own view. But it definitely appears from the appellate Court's award of one share for Henry, *first,* that Sara excluded him entirely from her will. He was dead; so was his widow and they were childless. This share, if sustained, will go to Respondent Catherine Ridgely Brown, a sister-in-law of Henry. It can be presumed that neither Mary Donaldson nor Sara Parker desired such a result.

Second, the other fourth share allotted to Robert goes to his widow, Sara's sister-in-law. It affirmatively appears that Sara did *not* want this result (R., p. 30).

We contend that the Circuit Court of Appeals struggled contrary to the Maryland law, to make a will for Mary Donaldson, but that its efforts were not as successful as the Maryland Law, literally applied by the District Court, accomplishes.

For the reasons stated, petitioners request that writs of certiorari issue as prayed.

Respectfully submitted,

JAMES MORFIT MULLEN,
Counsel for Petitioners.